UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEXSTAR BROADCASTING GROUP, INC. d/b/a
WETM-TV

Respondent- Employer

v.

Case 03-CA-125618

INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYESS AND MOVING PICTURE
TECHNICIANS, ARTISTS AND ALLIED CRAFTS
OF THE UNITED STATES, ITS TERRITORIES
AND CANADA, AFL-CIO

Charging Party –Union

BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

Nexstar Broadcasting Group Inc. ("Nexstar", "Respondent" or "Company") hereby submits its Brief in Support of its Exceptions from the Decision by Administrative Law Judge Steven Davis issued on January 15, 2015. This Decision was rendered following a Hearing which took place on a Complaint issued pursuant to the remaining allegations of a Charge filed by the International Alliance of Theatrical Stage Employees, Motion Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, AFL-CIO, CLC, Local 289 ("IATSE" or "Union"). Nexstar strongly denies that it has violated the National Labor Relations Act in any way,and affirmatively asserts that it has, at all relevant times bargained in good-faith with representatives of IATSE. Specific to the only allegation of unlawfuness in the Complaint, Nexstar denies that it has unilaterally changed any of the mandatory terms and conditions governing unit employees represented by IATSE. We submit that the National Labor Relations Board ("the Board") should refuse to follow the recommendations in said Decision and should dismiss the charge against Nexstar for all of the reasons set forth in this Brief in Support of the Exceptions filed herewith.

I. FACTUAL AND PROCEDURAL BACKGROUND APPLICABLE TO ALL EXCEPTIONS:

A. Nexstar and IATSE Met for Over a Year and Successfully Reached Agreement on All Issues Including the Permissive Issue of the Composition of the Collective Bargaining Unit, the Description of Which Radically Overhauled at the Company's Insistence

Nexstar's predecessor, (Newport Television LLC, d/b/a WETM-TV), and IATSE entered into a collective bargaining agreement on March 20, 2009, which expired on March 19, 2013, governing a collective bargaining unit at the WETM-TV station in Elmira, New York. (GC-3). The collective bargaining unit was described in that agreement's Recognition Article as follows:

> Section 1 –Scope of Jurisdiction: The Station recognizes the Union as the exclusive bargaining representative of all regular full time and part-time employees of the Station engaged in television broadcasting and web streaming at its television station WETM in Elmira, N.Y. and station's facilities, **excluding sales managers, general managers, account executives, department heads, including managing editor, production manager, station events coordinator, executive producer, chief meteorologist, news director, sports director, chief engineer,** and all other supervisors and guards as defined in the Act. (Emphasis added)"

While that collective bargaining contract was in effect, Nexstar announced it was acquiring the WETM-TV station, along with certain other assets of Newport Television LLC. Upon acquisition of this Elmira, NY station in December, 2012, Nexstar promptly recognized IATSE as the representative of the above–described unit and assumed the collective bargaining contract. (TR.161-163) Nexstar and IATSE began negotiations for a successor collective bargaining agreement covering the unit on February 22, 2013.

The parties subsequently met on multiple occasions in Elmira and exchanged numerous proposals concerning a wide range of subjects of bargaining, both mandatory and permissive, over a period of approximately a year. Those negotiations were successful with the parties tentatively reaching a new Agreement on January 31, 2014. The Agreement was ratified on February 26, 2014, and thereafter executed by the Parties.

Nexstar's bargaining committee over the course of these negotiations was comprised of Timothy Busch, Executive Vice President and COO; Scott Iddings, Director of Creative Services; and Don Hunt, Chief Engineer, and initially Scott Levy, News Director, who left the committee in August 2013, when he took a different position in Altoona, PA. (TR. 17-18, 66-67, 182)

On February 22, 2013, Nexstar presented its first proposal on the permissive bargaining topic of the composition of the bargaining unit by submitting a proposal which sought to clarify the Recognition Article as follows:

> Section 1—Scope of Jurisdiction: The Station recognizes the Union as the exclusive bargaining representative of all regular and part-time employees of the Station engaged in television broadcasting and web streaming at its television station, WETM in Elmira, N.Y. and said station's facilities, including master control operators, videographers, creative services producer/directors, anchors, reporters, newscast directors, production assistants (Remaining language of 2010-2013 Article deleted, see *supra*)(R-4)

This proposal was submitted consistent with the Company's intent to change the language of the parties' agreement to reflect its understanding of which individuals were, and should properly be, covered by the unit description; and conversely, those that were not. (TR. 163) A vigorous discussion regarding this new proposal and others submitted shortly thereafter. That lively debate occurred as a result of these proposals is hardly surprising. It unsurprising occurrence is contradicted by the Union's strange assertion, carried forward by the General Counsel at hearing, that the Parties did not discuss the removal of employees from the unit during negotiations. In the course of the negotiations on February 22, 2013, and in subsequent meetings, on March 28, 2013 and May 10, 2013, the parties had additional lengthy discussions over the subject.(TR. 166-177) IATSE at first, balked over any change in the language, then indicated that they would submit their own proposal. Never doing so, they eventually acquiesced in the new language that was proposed by the Company that substantially altered the language from the 2010-2013 Agreement that had been negotiated by Nexstar's predecessor and IATSE.

As noted above the initial proposal, (dubbed CO#2-1) was ultimately withdrawn and a new proposal, (CO #2-2) on the Recognition Article was submitted later at the same session on February 22, 2013. This proposal was as follows:

> Section 1 –Scope of Jurisdiction: The Station recognizes the Union as the exclusive bargaining representative of all regular and part-time employees of the Station engaged in television broadcasting and web streaming at its television station WETM in Elmira, N.Y. and station's facilities, including ***only*** master control operators, videographers, creative services producer/directors, anchors, reporters, newscast directors, production assistants ***and not any supervisory or managerial roles.***

Extensive discussions occurred between the parties over this proposal at the session it was introduced, (2/22/14) as well as at the next two sessions occurring on March 28, 2013 and May 10, 2013. In fact, Company negotiators recall that at the March 28th session, the chief IATSE negotiator, International Representative Joseph Hartnett, pressed the management committee for a definition of what they considered to be "supervisor".(TR.170-173, Lead Nexstar negotiator, Mr. Busch, took it upon himself to research the issue and found a publication entitled "*The Definition of "Supervisor" Under the National Labor Relations Act'*, that had been written and published by the Congressional Research Service on July 5, 2012. (R-1). Mr. Busch discussed and highlighted portions of the article dealing with the Board's *Oakwood Healthcare* decision wherein it was stated that that decision "established new definitions for purposes of the NLRA: "assign" and "responsibly to direct" employees and to exercise "independent judgment".(TR. 170-171) Mr. Busch recalls that the IATSE committee and Mr. Hartnett asked some questions regarding these concepts, and seemed to understand and accept the points that the article made regarding supervisory authority in the realm of responsible direction of the workforce and, that a consensus was arrived at as to what constituted a "supervisor" or "supervisory" or "managerial" roles. (TR. 169-171) Mr. Busch also testified that there were discussions at the bargaining table specifically about both Doland and Kastenhuber and their roles as "supervisors",(TR. 170-177), with Doland even nodding in acknowledgement when he was referred to as a supervisor. Mr. Hartnett, on the other hand, acknowledged that he had made some mistakes in renegotiating the Recognition Article, by implicitly conceding that he should have consulted an attorney, in renegotiating these provisions, as he did not realize how important such an issue was before these negotiations. (TR. 28) The ALJ did not mention this admission in his Decision while wrongly concluding that Mr. Busch should be discredited for a perceived inconsistency in his testimony and ignoring Mr. Hartnett's testimony that acknowledged that he quite frankly erred in agreeing to the new language in the contract.

At the March 28th meeting there was also a discussion concerning several other job classifications that were being improperly dealt with under the existing contract. A production assistant, named Sydney

Williams, was mentioned and Mr. Busch indicated that since he was involved in production he properly belonged in the unit, even though, to date, he had not been treated as such or required to join the Union An Administrative Secretary/Receptionist, Nicole Chorney, and her duties serving as a confidential secretary to the Station's General Manager were discussed. (TR. 21-22, 26, 68) The Company noted that she was not involved in "news" or "production" and that her job was not listed in the existing contract and, as a result, she did not belong in the unit.

Apparently comfortable with the explanation given regarding the definition of "supervisor" and the ensuing discussion, as well as the suggested treatment of the production assistant Sidney Williams and the administrative assistant Ms. Chorney, the Union indicated it would not follow through on its earlier indication that it would submit its own proposal on Recognition. Most significantly, the Union would acquiesce in the changes proposed by the Company. Ultimately, having reached a "meeting of the minds", on May 10, 2013, the Parties tentatively agreed to the proposal denominated as CO #2-2 as set forth above. (TR.174-175)

And finally, after over a year of bargaining sessions between the parties, a tentative agreement was arrived at on all issues in the afternoon of January 31, 2014. The union subsequently voted on, and ratified the new collective bargaining agreement on February 26, 2014 after holding three meetings where the tentative agreement was available for discussion. (TR.175) Prior to doing, so IATSE negotiators were provided with a blue-lined copy of the tentative agreement which carefully outlined all changes made to the Parties' overall agreement. The Company was advised that this blue-lined iteration was shared with the membership prior to the ratification vote. Following the vote, a "Final" version of the new Agreement was created for the blue-lined version. This new Agreement was executed by Mr. Busch for the Company on March 18, 2014, and for IATSE by Joseph Hartnett on March 24, 2014. (TR.175-178) (Final Collective Bargaining Agreement between IATSE and Nexstar, GC-4)

B. Following the Ratification of the New Collective Bargaining Agreement, And Acting Consistent with its Terms, the Company Implemented these New Terms By Notifying the Union That One Individual Would Now Be Considered as in the Unit, While Others Would Not Be.

Shortly after the execution of the agreement by both parties, on March 26, 2014, Scott Iddings notified David Siskin, IATSE Local 289 President that given the new Agreement and its new language in Article I, Section I that one employee (Sydney Williams) will need to join the unit and three (Nicole Chorney, John Doland, and George Kastenhuber) will be no longer in unit, based on their job duties. This was done, as Mr. Busch put it, at the hearing: "because George and John were not part of the bargaining unit based upon being supervisory and Nicole based upon the admin assistant being removed as well, under the exclusionary language. (TR. 177)

Following receipt of this notice, the Union did not file a Grievance under the Parties' Collective Bargaining Agreement, and instead, filed an Unfair Labor Practice Charge with the Board's Region 3 in Buffalo, New York. Allegations made by the Union regarding discriminatory animus were dismissed, as were charges related to the removal of Nicole Chorney from the unit. Only the allegation in the Charge relating to supervisors Doland and Kastenhuber became the subject of a Complaint. In that Complaint, the General Counsel asserted that this action constituted a "unilateral change" of "terms and conditions of employment" resulting in a violation of section 8(a)(5) of the Act.

II. ARGUMENT IN SUPPORT OF EXCEPTIONS 13-49:

A. Supporting Argument for Exceptions 13-30: *Following Good Faith Negotiations, Agreement Was Reached Amending and Clarifying the Parties' Understanding of, and the Actual Language of the Collective Bargaining Agreement's Recognition Article*

Contrary to the assertions in the charges filed by the Union, and adopted by the ALJ in his decision, even a cursory review of the facts noted above establishes that Nexstar has at all times bargained in good faith in arriving at, and then implementing, the parties' new three year collective bargaining agreement. Nexstar negotiated with the Union for a period of time spanning approximately a year, during which both parties had ample opportunity to submit and re-submit proposals on all the subjects of bargaining, both mandatory and permissive. Most significantly, as detailed above the Parties had spirited and detailed discussions on the **permissive** subject of the Recognition Article, and the various job classifications outlined therein in that Article as comprising the unit. Both parties are necessarily charged with a fair understanding and knowledge of the various job classifications and the Station's operations. They should not be able to 'sit-back' and pretend that they were unaware of the implications of their discretionary and permissively undertaken decision to enter into carefully considered language amending the terms of a Recognition Article of a Collective Bargaining Agreement. Mr. Hartnett conceded as much, yet the ALJ, without support in the law used the Board's unfair labor practice mechanism as a means to save the Union from its bad deal.

Examining the totality of the circumstances surrounding the parties' lengthy and successful negotiations it is clear that Nexstar bargained in good faith. In an attempt to controvert this obvious factual and legal conclusion, the Union, and the General Counsel has intimated that the Company bargained in bad faith by 'unilaterally' acting to change these classifications. By this they hope to be able to sustain their burden of establishing bad faith violating the Act by reliance on the per se doctrine of *NLRB v. Katz*. That doctrine has no application to this case. The *Katz* doctrine' applicability to this case was negated by the Parties' own actions, and it was negated no matter which version (Company vs Union) of the facts one accepts. If one accepts the Company's version of the facts relating to the bargaining, *Katz* is inapplicable because the Parties agreed to a new Recognition clause in the 2014-2017 contract, that was substantially different from the predecessor's, and the Company was merely implementing that fully negotiated understanding when four employees were moved in and out of the unit at the time the contract was executed. (This proposition is discussed at subsection II, B below) However, even if one accepts the Union's version of the facts and the conclusion that no bilateral agreement was reached on the composition of the bargaining unit, as the ALJ did, the *Katz* doctrine is still not applicable. (This proposition is fully explored in subsection II, C) below). This is due to the simple and incontrovertible principle of law that **unilateral changes on a permissive topic of bargaining do not violate the National Labor Relations Act**. *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate-Glass Co.*, 404 U.S. 157, 78 LRRM 2974 (1971).

B. Supporting Argument for Exceptions 13-28: ***Following Ratification of the New Contract, the Company Acted Lawfully and Properly and for the Sole Purpose of Implementing the Terms of the Newly-Ratified Agreement and Otherwise Conforming the Parties' Agreement to Law***

The Union initially charged that the Company's actions involving Doland, Kastenhuber and Chorney were done to "threaten and intimidate employees and discourage concerted, protected activity". It submitted no evidence to support this baseless assertion. The General Counsel, acting through Region 3, dismissed this element of the Charge leaving the bare assertion that the Company violated the Act by unilaterally changing the composition of the bargaining unit. However neither the facts nor the law support this allegation. The law is clear, as we will expound on below, that the National Labor Relations Act is not violated in the circumstances involved in this case. When the Company notified IATSE of the actions it was taking with regard to the four (4) bargaining unit members involved, it did so for the sole and lawful purpose of applying permissively negotiated, contractually-agreed upon language to the affected individuals----with the result that one (1) was added to the unit, while another three (3) were taken out. To do otherwise would have negated the Parties' agreement on this issue, and continued to improperly apply the contract to statutory supervisors. In these circumstances, admitted and acknowledged by the Parties, at the hearing, the Act is not violated.

C. Argument in Support of Exceptions 31-36: ***Removal of Improperly Classified Individuals from a Bargaining Unit upon the Renegotiation of Unit Language is Not a Unilateral Change that Violates the Act***

In *NLRB v Katz*, 369 U.S. 736, 50 LRRM 2177(1962), the Supreme Court approved the Board's determination the National Labor Relations Act is violated when an Employer makes a unilateral change during the course of a collective bargaining relationship concerning matters that are **mandatory** subjects of bargaining. Such changes are deemed "***per se***" violations of the Act, meaning, of course, that it is not necessary to prove or establish that the changes were unlawfully motivated by discriminatory animus. Conversely, however, in an instance such as this case, where the General Counsel has not sought to prove discriminatory animus,(because it does not exist), it must rely on the *Katz* doctrine to sustain its argument that the Act was violated. However, for obvious reasons, that burden cannot be sustained in this case.

First, and perhaps foremost, among these reasons is the undeniable fact that the supposed "change" was hardly "unilateral". Indeed the Parties, as outlined above, collectively bargained a sea-change in the language of the Recognition Article of their collective bargaining agreement. There were literally hours of debate over three days spanning nearly three months, (February 22, March 28 and May 10----all of 2013), concerning the significant changes they finally agreed to. A tentative agreement was eventually arrived at on these changes on May 10, 2013. Another eight and a half months passed before tentative agreement was reached on all terms of the Agreement. All of this time was available for additional analysis of the agreed upon terms of a vastly different recognition clause. Mr. Harnett acknowledged his participation in these bargaining table discussions, and his eventual acquiescence to the permissively negotiated changes. He even tacitly admitted that he had learned a lesson during these negotiations, by stating that prior to these negotiations he did not consider the negotiations over a recognition clause as important as he does now. (TR.28) In no sense, can these "changes" be deemed as "unilateral"-------**they were bilateral in every way.**

And perhaps just as significantly, these bilateral changes, were made on a *permissive* subject of bargaining. Forty six years ago in *Pittsburgh Plate-Glass Co., supra,* the United States Supreme Court, by a 6-1 majority, held that an employer's act of unilaterally changing a permissive, non-mandatory subject of bargaining does **not** constitute a violation of section 8(a)(5). In that case the 'change' involved the **unilateral** mid-term modification of retiree health benefits which the Court determined had been established by permissive bargaining. Since the holding in *Pittsburgh Plate-Glass, supra*, the doctrine has been applied to the non-mandatory subject of bargaining applicant drug testing of applicants for hire, (*Star Tribune Division*, 295 NLRB 543, 131 LRRM 1404 (1989)). The Supreme Court in *Pittsburgh Plate-Glass* explained the rationale behind its holding as follows

> **If that is correct, the distinction that we draw between mandatory and permissive terms of bargaining fits the statutory purpose. By once bargaining and agreeing on a permissive subject, the parties, naturally, do not make the subject a mandatory topic of future bargaining.** When a proposed modification is to a permissive term, therefore, the purpose of facilitating accord on the proposal is not at all on point, since the parties are not required under the statute to bargain with

> respect to it….(portion omitted). We think it would be no less beside the point to read paragraph (4) of 8 (d) as requiring continued adherence to permissive as well as mandatory terms. **The remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract, see n. 20, *supra,* not in an unfair-labor-practice proceeding. 404 U. S. 157, 184. (Emphasis added)**

It is axiomatic that a recognition clause setting forth the scope of a bargaining unit is a permissive subject of bargaining. *Douds v. Longshoremen* (ILA), 241 F.2d 278, 39 LRRM 2388, 2391(2d. Cir., 1957). Consistent with this rule of law, it has been held that where the Board has originally fixed the unit, "it may be altered by agreement of the parties," (*Douds*, 241 F.2d at 232), but that the party seeking to alter the unit may not insist on the alteration to the point of impasse". *Branch Intl. Services*., 310 NLRB 1092, 145 LRRM 1108, enforced, 12 F 3d. 213, 145 LRRM 2512 (6th Cir., 1993).

So, under the clear teaching of *Pittsburgh Plate-Glass*, if the Union believed that the Company's act of 'removing' individuals from the bargaining unit was improper, they should have filed a grievance under the arbitration clause of the Parties' agreement, and not an unfair labor practice. This is true because it is clear that 'changes' (even those which are unilateral---which the Company has established that these were not) on permissive subjects of bargaining are not an unfair labor practice charge As the Supreme Court noted as long ago as 1971, the Union's proper remedy if they objected to the Company's interpretation of the new provision was arbitration or an action under Section 301 of the Labor Management Relations Act. 404 U. S. at 184.

Or the Union could have avoided the issue altogether by refusing to bargain over this permissive subject at any point in the process. But bargain they did, and they must live with the consequences of their choice to bargain on a permissive topic of bargaining. It is simply improper for them to utilize the Board's unfair labor practice mechanism, at this point, to undo the bargain they either struck or did not strike at the table. As the Supreme Court pointed out in *Pittsburgh Plate Glass, supra,* they could have pursued contractual remedies that they had available to them under other provisions of federal law(407 U. S. at 184), but did not, and in failing to do so, waived these remedies. (*infra* at II, D)

The General Counsel in hopes of avoiding the obvious consequence of this clear mandate from *Pittsburgh Plate Glass, supra* cited to a case decided twenty-one (21) years before the Supreme Court decided *Pittsburgh Plate Glass:* the 1950 Board decision in *Arizona Electric*, 250 NLRB 1132 (1950). Quite frankly, that decision, (and a 2014 decision *Dixie Electric Membership Corp.*358 NLRB No. 107, (appeal pending, case no. 15-ag-60104, 5th Cir.) which follows *Arizona Electric* uncritically without any explanation or discussion of *Pittsburgh Plate Glass* or its reasoning) wrongly decided under *Pittsburgh Plate Glass*. This is so because there can be no doubt that an Employer's unilateral change on a collectively bargained permissive subject is simply NOT an unfair labor practice under *Pittsburgh Plate Glass, supra*. It may be a violation of the parties' contract, but it cannot be an unfair labor practice under *Pittsburgh Plate Glass*, 407 U.S. at 184.

And in a final attempt to side-step around this point, the General Counsel argued, and the ALJ accepted the notion that the Act was violated by the "unilateral transfer of unit work outside the bargaining unit". This assertion ignores the fact that no unit work was moved or transferred. Rather, as the ALJ found, in another portion of his decision the scope of the bargaining unit was changed. (JD 18-3039) So it is only logical to conclude that "unit work" did not **move** into or out of the "unit"-----there was no transfer---unilateral or otherwise. The boundary lines of the "unit", or the "unit" itself moved, not the work. And as we have seen movement of the boundary lines due to collective bargaining is movement on a permissive subjective of bargaining.

D. Argument in Support of Exceptions 39-49: *The Charging Party Union Waived its Right to Bargain Further over the Implementation of the Negotiated Change*

The ALJ misapprehended the nature and scope of Nexstar's 'waiver' argument and also misapplied the notion of deferral under *Collyer Insulated Wire* 192 NLRB 837, 77 LRRM 1931 (1971) as was raised and discussed in this case. In the portions of his decision excepted to by Nexstar's Exceptions 39-49, the ALJ mischaracterized Nexstar's baseline argument that it did not violate the Act because it took no unilateral action, as an argument that the Union waived its right to bargain over the issue. Nexstar never asserted that the Union waived its right to bargain during the course of the parties' year-long negotiations.

Instead Nexstar argued vigorously, and still does, that a bargain was struck following challenging negotiations, radically revising the language of Article I the Recognition Clause. Nexstar also argued that it did not act unilaterally when it implemented the deal that was struck at the table on this permissive subject of bargaining. It also contends that it is only at this point that "waiver" by the union occurs. As noted, above, the Union could have pursued its contractual remedies at this point, as dictated by the teaching of *Pittsburgh Plate Glass, supra*. Instead, it pursued a path closed to it by that decision.

E. Argument in Support of Exceptions 1-13: ***In any event, John Doland and George Kastenhuber are Supervisors and are Properly Excluded from the Unit***

Whether or not John Doland and George Kastenhuber are "supervisors" or not, the foregoing argument establishes that **no unfair labor practice occurred** when the Company implemented the new 2014-2017 Collective Bargaining Agreement's new Recognition Article I in March of 2014. This is so because any change was simply the implementation of a new contract term in a permissively negotiated provision. However, although not at all necessary to a finding that no unfair labor practice has been committed, we believe that the record is clear that the individuals subject to the implemented term of the parties' new collectively bargained recognition clause and at issue in the hearing----Doland and Kastenhuber----are supervisors. As such, not only was there not an unfair labor practice committed by the implementation of these bargained terms, no violation of the Parties' contract occurred when the implementation took place.

There can be no doubt that John Doland and George Kastenhuber are supervisors. This is true, both of their proper categorization under *section 2(11)* of the NLRA and, by way of contract interpretation----- their categorization as such under the Parties' 2014-2017 collective bargaining agreement. It is obvious that the parties were negotiating with the parameters of *2(11)* in mind when they discussed and then agreed to exacting language with respect to the scope of the bargaining unit as memorialized in the Recognition Clause (Article I, Section I). As a matter of contract interpretation, for all intents and purposes the parties' collective bargaining agreement should be read as if *2(11)* were actually laid out verbatim in the Agreement for that is the clear lesson of the recounting of the Parties' bargaining history.

The old contract between Nexstar's predecessor and the Union endeavored to list the excluded job classifications, **but that list of 'excluded' job titles was excised from the new Agreement----opening up the broader, and more traditional exclusion of all "supervisory" and "managerial" roles from the unit.** This result was driven by a deliberate effort, which the Union acquiesced in, on the Company's part to clarify, and dramatically change, the language to avoid future problems of ambiguity and contract interpretation. As Mr. Busch put it at the hearing: "When we had reviewed the scope of jurisdiction, what I had determined which was going to be a proposal, was that the exclusionary part should not be a part of this contract. In other words, the scope of the jurisdiction should list and define who's covered by the bargaining unit and not those who were excluded". In response to questioning, Mr. Busch went on to explain a variety of problems associated with this sort of language, including the uncertainty of coverage of newly-created classifications or accreted or acquired entities, stating that "my goal is to refine who is covered under the CBA" and that "I shouldn't care about and neither should I have to care about who is excluded". (TR.177) This intent was clearly carried out in the proposal eventually accepted and then ratified by the Union as the new Recognition article eliminated the laundry-list of twelve separate "excluded" job classifications from the unit description. It was the Company's hope that the confusion that could result in many circumstances from their continued inclusion would be eliminated. (TR. 170-177).

Section 2(11) of the NLRA provides:

> "The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them or adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment." *29 USC Section 152(11).*

Of course, considerable controversy has emerged over the years regarding the latter portion of this definition dealing with the terms "responsibly direct" and "effectively recommend" and the language following upon it. But cases (Supreme Court's decision in *NLRB v. Kentucky River Community Care* 532 U.S. 706 (2001) and the Board's decision in *Oakwood Care Center 343 NLRB No.76, 176 LRRM 1033(2004)*) have emerged that have resolved the question. Under *Oakwood*, terms such as "responsibly direct' and "assign" are interpreted broadly and individuals who assign work to "employees" on a daily basis are considered "supervisors". The ALJ in arriving at his decision that the two individuals were not supervisors relied on a series of cases that blithely ignore the *Kentucky River/Oakwood* principles and label individuals as "employees" by ignoring obvious and strong evidence that they "responsibly direct" and "effectively recommend" on a daily basis by engaging in the charade that it is not done 'independently.' While undoubtedly this *Kentucky River* controversy will likely continue and seems to have found its way into the ALJ's decsion, there is no doubt that the parties were working off the *Kentucky River/Oakwood* formulation when they arrived at the new language in the 2014-2017 contract. Viewing Doland's and Kastenhuber's job duties in this light of this formulation, which is, of course the proper way to analyze the facts, leaves no doubt that the parties agreed that they are "supervisors" under the collective bargaining agreement and that they are "supervisors" under 2(11) of the Act as interpreted by the controlling precedent of *Kentucky River.* A review of those principles is thus necessary to decide what the parties intended when they agreed to change the language in their collective bargaining agreement.

The National Labor Relations Board, applying the teachings of the Supreme Court in *Kentucky River, supra* has set forth guidelines for determining whether an individual is a supervisor under the National Labor Relations Act In its 2006 *Oakwood* decision, the Board held that the permanent charge nurses employed by the Employer, an acute care hospital, exercised supervisory authority in assigning employees within the meaning of Section 2(11). *Oakwood, supra*. The Board found that the charge nurses, as a regular part of their duties, assigned nursing personnel to the specific patients for whom they would care for during their shift. The Board found that such assignments, which consisted of giving "significant overall duties" to an employee, met the statutory definition of "assign" under the Act. The Board further found that the Employer met its burden to show that its charge nurses exercised independent judgment in making such assignments.

In *Kentucky River Community Care, supra*, the Supreme Court criticized the Board's extant interpretation of the Section 2(11) term "independent judgment." As a result, the Board endeavored in its *Oakwood Healthcare* decision to reexamine and clarify its interpretations of the term "independent judgment" as well as the terms "assign" and "responsibly to direct," as those terms are set forth in Section 2(11).

The Board defined "assign" as the act of "designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks, to an employee." Further, to "assign" for purposes of the Act, "refers to the . . . designation of significant overall duties to an employee, not to the. . . ad hoc instruction that the employee perform a discrete task."

The Board then defined the statutory term "responsibly to direct" as follows: "If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both 'responsible' . . . and carried out with independent judgment." The Board held that the element of "responsible" direction involved a finding of accountability, so that it must be shown that the "employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary" and that "there is a prospect of adverse consequences for the putative supervisor" arising from his/her direction of other employees.

Finally, consistent with the Supreme Court's decision in *Kentucky River*, the Board adopted an interpretation of the term "independent judgment" that applies irrespective of the Section 2(11) supervisory function implicated, **and without regard to whether the judgment is exercised using professional or technical expertise**. The Board defined the statutory term "independent judgment" in relation to two concepts. First, to be independent, the judgment exercised must not be effectively controlled by another authority. Thus, where a judgment is dictated or controlled by detailed instructions or regulations, the judgment would not be found to be sufficiently "independent" under the Act. The Board further found that the degree of discretion exercised must rise above the "routine or clerical" in order to constitute "independent judgment" under the Act. Applying this analysis to the individuals and classifications at issue in this case, there can be no doubt that they are "supervisors" within the meaning of section 2(11), and that the ALJ ignored and improperly analyzed the factors established by *Kentucky River* and *Oakwood Healthcare.*

(1) John Doland should be considered as in a "supervisory role" and excluded from the bargaining unit under the Parties' new 2014-2017 Collective Bargaining Agreement and is a "supervisor" under section 2(11) of the Act.

John Doland is the Chief Photographer/Videographer at WETM. In this role, it is evident that he supervises the unit Videographers and routinely directs them, in most, if not all, of their work assignments. (TR. 49-51) In terms of the direction of work amongst the photographers that he supervises, Doland attempted to explain away his role in this by stating he didn't have time to do the things that he was authorized to do in his job description. (TR. 49)This, of course, misses the point , in that the Board has long looked at actual authority to delegate assignments, not to whether , a supervisor is actually able to carry out all job functions as outlined on a job description. As to performance evaluations, there is no similar "dodge" as Doland evidently did have time to fill these form out for each of the employees he supervised in 2013 and 2014. And he is designated as their "**Supervisor"** on their Employee Evaluation Forms---a point that he testified to at the hearing----that he disingenuously claimed to have missed until Nexstar called it to his attention at the hearing. (Likewise he disingenuously claimed to have missed the implications of the parties' negotiation over the recognition clause and its implications for his continued inclusion.) Regardless of this dubious assertion, a collection of such forms evaluating

Photographers/Videographers Chuck Brame, Jaran Reid, Jesse Martin and Rich Tanner in April 2013 was produced at the hearing (marked as R-2)----and all clearly marked Doland as a "Supervisor". And just as importantly, on these forms, it is clear that Chief Videographer and "Supervisor" Doland exercises complete discretion in evaluating employees, unfettered by the dictates of anyone else in the News function. After evaluating each of the employees, Doland signed off on each of his employees' evaluations. Prior to 2013 and WETM's acquisition by Nexstar, Doland provided meaningful input on such evaluations, but the evaluations themselves were conducted by the News Editor.

In addition to his considerable role in the evaluation and direction of the work activities of employees, Doland is authorized to play an important and extensive role in the selection, interviewing and the hiring of all candidates for employment as photographers/videographers at WETM-TV. In fact, he admitted to actually playing a critical role in the hiring process several of the current photographers at the station (Tanner and Brame), acknowledging that he would take each of the candidates out 'for a shoot' and recommended their hire on this basis. This was not necessary for two individuals, one whose father was the General Manager at the time and another with whose skills he was familiar, (TR.73-76) Finally, it should be noted that Doland is paid much more per hour than the unit's Photographers/Videographers, **earning a startling approximately $7.50 per hour more than the average of the four (4) employees that he supervises.** (TR. 197) The fact that this may have been agreed to by a predecessor employer and/ or is due to his superior skills and abilities as Chief Photographer is irrelevant to, and does not undercut in any way the support that this key fact provides for the undeniable conclusion that he is a "supervisor" and should be regarded as in a "supervisory role" under the Parties collective bargaining agreement.

***(2.) Kastenhuber should be considered as in a "supervisory role" as excluded from the bargaining unit in the Parties' new 2014-2017 Collective Bargaining Agreement and as a "supervisor" under section 2(11) of the* Act.**

George Kastenhuber is the Assignment Editor at WETM. As his job title of Editor connotes he routinely, and as his primary job function, assigns and then edits news stories to the unit employees he supervises. (TR. 98-101) He also hands out to, and edits assignments for, Anchor II's, who work part-time as General Assignment Reporters, in addition to their Anchor II duties. He "tracks stories from all sources, including government agencies, wire services, and committee groups". (TR. 100) He "assigns daily news stories" to reporters in many situations involving "breaking news" and morning stories. He admitted that "breaking news" occurred frequently, perhaps as often as eight times per month (TR.126). He indicated that he has the authority and has pulled reporters from one story to cover another. (TR.124-126) In all of these things he exercises "independent judgement" circumscribed only by his own thoughts and opinions. The ALJ noted that when "breaking news" occurs he reassigns news units to cover the action determined by who is closest to the action. But the ALJ failed to note that this is done this way because he has independently determined that this is the best way to do it. (Tr. 124-127)

Like Doland, in comparison to those he supervises, Kastenhuber is paid considerably more than these General Assignment Reporters and Anchor II's, **averaging approximately $4.00 per hour more than the unit employees he supervises**. (TR. 200) The fact that this may have been agreed to by a successor employer and /or is attributable to his superior knowledge or skill built on his years in the community and in the news business does not undermine the strong evidentiary support that this incremental difference in wages supplies to the finding that he is a "supervisor". On the formal Evaluation of his performance, Kastenhuber's work in staffing management is discussed. In his March 18, 2013 evaluation it is noted that "As our Assignment Editor, George does a solid job in helping assist the News Director in staffing each day and looking for ways to cover stories without overtime". His extensive role in setting the editorial tone of the station's news coverage was summarized in evaluation of his performance where it stated: "George is responsible for getting the day started editorially. He has a number of great contacts in the market and does a great job of establishing relationships with first responders in the area." (TR. 124) (R-1)

F. ARGUMENT AS TO EXCEPTIONS 53-60: ***The Remedy Recommended by the ALJ is Unnecessary as there is No Violation of the Act Established, and Assuming Arguendo a Violation was***

Committed, Certain Elements of the Proposed Remedy are Not Warranted by Substantial Evidence and the Law

First, Respondent contends that no Remedy should issue as there has been no violation of the Act established. Assuming *arguendo*, the existence of a violation, the proposed Remedy recommended by the ALJ is improper in a number of regards. If a failure to bargain in good faith is established, the only proper remedy established by the provisions of section 8(d) is an order to bargain over mandatory subjects of bargaining. And even if we were dealing with a change regarding a mandatory subject of bargaining, there is no authority vested in the Board to compel agreement to any terms. The Board's limited authority in terms of fashioning a remedy for a violation of section 8(a)(5) stems from section 8(d) of the Act, which provides in pertinent part, "but such obligation(to bargain in good faith) does not compel either party to agree to a proposal or require the making of a concession" 29 USC Section 158(d). In *H. K. Porter* v. *NLRB*, 397 U.S. 99, 73 LRRM 2561 (1971),the Supreme Court held that the Board lacks remedial authority under the Act to require a party to agree to a specific The only appropriate order would be one ordering the parties to bargain. While the Board has seen fit to provide a status quo ante remedy in situations involving unilateral changes in mandatory subjects of bargaining, such a remedy in this situation would be improper for many reasons. Chief among these is the unfairness of forcing upon all involved in this dispute an agreement which is exactly the opposite of what the Respondent believes was bargained at the bargaining table. A *status quo ante* remedy would be nothing more than a forced bargain on the crucial, and permissive topic of the composition of the bargaining unit. And this is particularly unfair to impose such a provision, when the Charging Party Union had an appropriate remedy available to it----a Grievance under the Parties' collective bargaining agreement. *Pittsburgh Plate Glass, supra.*

Even if we were dealing with a unilateral change on a mandatory subject, to the extent that the ALJ's proposed order "reinstate(s)" Doland and Kastenhuber to the bargaining unit, it would be *ultra vires.* Likewise, the ALJ' proposal as to the Order that the "Respondent shall also be required to apply the terms of the collective bargaining agreement, effective February 26, 2014 through February 25, 2017, to employees occupying the positions of assignment editor and chief videographer", would also be *ultra vires.* And as a result of the lack of authority to render such an Order, it would also be improper to provide Kastenhuber and Doland a make-whole remedy, even if it were established that they suffered economic loss. And of course it should not be done on a record on which, the ALJ: "the record does not establish that John Doland or George Kastenhuber suffered any economic loss as a consequence of the Respondent's actions". (JD 22: 5-7)

As an additional remedy, the ALJ proposes that the Respondent "shall also be required to reimburse the Union for any dues that would have been deducted from Doland and Kastenhuber and remitted to the Union" This proposal is not proper, for like the others, it is not justified given the absence of an established violation of the Act and it is *ultra vires* for its attempt to impose permissive contract terms in contravention of section 8(d)' s proscription against such an imposition. Moreover, by re-routing the obligation to pay dues from employees it forces a violation of section 302 of the Labor Management Relations Act, ("LMRDA") by requiring the direct payment of union dues by an employer to a union. 29 USC Section 186. Monies flowing directly from an Employer to a Union are carefully circumscribed by section 302. Section 302(a) and (d) states that it is unlawful, indeed criminal, for an employer to make payments of any kind to a representative of employees or a labor organization. 29 USC 186 (a) and (d). Section 302(b) sets forth a number of exceptions or circumstances to this prohibition where this is allowed and not considered illegal. 29 USC 186(b). None of these are applicable to the proposed Order. Ordered payment of dues directly from the Respondent to the Charging Party Union would be illegal.

III. CONCLUSION

This Board should refuse to adopt the recommendations and conclusions in the Administrative Law Judge's Decision sustaining the General Counsel's Complaint in this matter. The General Counsel and the Union have failed to sustain their burden that the Company has violated section 8(a) (5) of the National Labor Relations Act when it implemented the terms of a newly negotiated collective bargaining agreement on a permissive subject of bargaining.

Dated: March 16, 2015

NEXSTAR BROADCASTING GROUP, Inc. d/b/a WETM-TV

/s/ Charles W. Pautsch

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AFFIDAVIT OF SERVICE

I hereby certify that I served the foregoing Brief of Respondent Employer in Support of its Exceptions from the Decision of the Administrative Law Judge on counsel for the Charging Party Union and Counsel for the General Counsel by placing a copy of same in the United States Mail, postage paid on March 16, 2015 and via e-serve and by email service to their email addresses as noted below:

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